(6)

No. 85-5542

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN BERNARD FORD, OR CONNIE FORD, individually, and as next friend on behalf of ALVIN BERNARD FORD,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE AND THE MENTAL HEALTH ASSOCIATION OF FLORIDA AS AMICI CURIAE

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MOTION OF THE OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE AND THE
MENTAL HEALTH ASSOCIATION OF FLORIDA
FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 36.3 of the Rules of this Court, the Office of the Capital Collateral Representative for the State of Florida (herafter "CCR") and the Mental Health Association of Florida (herafter "MHFA") move for leave to file the attached brief as amici curiae.

The reasons supporting the granting of this motion and the issues which amici are uniquely qualified to address are set forth in the statement of interest of amici in the attached brief.

Petitioner has consented to the filing of this brief, and his letter is being filed with the Clerk of this Court. Consent was requested of respondent, but was denied. Amici respectfully submit that they

have important, relevant, and expert information to contribute to the Court that will be useful in deciding this case, and that will not be provided by the parties.

Respectfully submitted,

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October 31, 1984

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THE INTERESTS OF THE OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE FOR THE STATE OF FLORIDA AND THE MENTAL HEALTH ASSOCIATION OF FLORIDA

The Office of the Capital Collateral Representative for the State of Florida (CCR) was created by the Florida Legislature, effective July 1, 1985, in response to the compelling need for representation in post-conviction proceeding for indigent prisoners sentenced to death. That the legislation establishing CCR had the vigorous support of the Attorney General of Florida and passed both houses of the Legislature unanimously indicates how widely the problem of non-availability of counsel was recognized.

This new State agency is charged with representing indigent prisoners sentenced to death who are unable to secure counsel in collateral challenges in State or Federal

courts after direct appellate proceedings are concluded and the conviction and sentence have been affirmed.

As the State agency expressly responsible -- under a limited budget -- for representing all indigent Florida prisoners under sentence of death, CCR has a critical interest in the establishment of appropriate guidelines for affording procedural due process protections for its clients who may have become insane while facing execution.

The Mental Health Association of Florida, a non-profit corporation, works for improved research, prevention, detection, and treatment of mental illness. Its members include clients of mental health services, their families, and other interested citizens.

MHAF has a clear interest in this case for two reasons. First, some of its members

receive mental health treatment and are potentially vulnerable to conviction, sentence, and execution even while being treated. Second, MHAF adopted a policy statement in 1984 on the mental capacity to be executed, opposing the execution of anyone lacking it, opposing the appointment of government psychiatrists to determine it, and endorsing judicial determination of it. MHAF, having lent its expertise to bring this issue to the public's attention, is eager that it be resolved favorably in this Court.

FACTS

Amici adopt the Statement of the Case submitted by Petitioner Alvin Ford in his Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The reliance by the Eleventh Circuit on Solesbee v. Balkcom, 339 U.S. 9 (1950), in upholding Section 922.07 of the Florida Statutes was misplaced, because Solesbee is at worst no longer good law and at best inapplicable to Section 922.07. Condemned prisoners suffering from insanity must be accorded certain procedural due process protections, including effective counsel, timely access to mental examiners' reports, evidentiary hearings, and judicial review.

Irrespective of whether the Eighth Amendment prohibits execution of the insane, the Fourteenth Amendment requires that the fundamental elements of procedural due process be provided when a State creates a right not to be executed while insane. Thirty-six states that impose the death penalty afford

the condemned person the right not to be executed while insane.[1] Yet some, like Florida, provide little or no procedural protections in making that determination. In short, the states and their highest courts are in hopeless conflict about the procedural due process to be accorded the condemned person in the determination of whether he is insane. To compound the problem, the Eleventh Circuit, while holding that no procedural due process is required, relied, for all practical purposes, solely on an opinion of this Court that is no longer good law. The Eleventh Circuit has practically invited review: "If our application of Solesbee [v. Balkcom, 339 U.S. 9 (1950)] and Goode [v. Wainwright. 448 So.2d 999 (Fla. 1984)] is to be altered, it must be done by the Supreme

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[1] See Appendix II.

Court, or at least by this court sitting en banc." Ford v. Wainwright, 752 F.2d 526, 528 (11th Cir. 1985), reh'g en banc denied. 765 F.2d 154 (11th Cir. 1985).

In particular, the Petition should be granted for two reasons: (1) this Court's decision in Solesbee v. Balkcom. 339 U.S. 9 (1950) is simply no longer good law, and should be formally overruled, at least as it is applied to the circumstances of this case; (2) while procedural due process is a flexible concept, it requires certain minimums which were not met in this case, under Florida law and practice, and which are not met under the laws of most of the other states which still have the death penalty.

Attached to this brief as an appendix is a survey of each of the 41 states which still

have capital punishment, indicating which, if any, afford the condemned what procedural due process protections.

ARGUMENT

I. The decision in Solesbee should be formally overruled.

The courts below held Petitioner was not denied procedural due process in the Governor's determination of his sanity. Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984); Ford v. Wainwright, 752 F.2d 526 (11th Cir. 1985), reh'g en banc denied, 765 F.2d 154 (11th Cir. 1985). Recognizing that under Florida law "an insane person cannot be executed", Ford v. Wainwright, 451 So.2d 471, 475 (Fla. 1984) (quoting Goode v. Wainwright, 448 So.2d 999, 1001 [Fla. 1984]), acknowledging Petitioner was denied an adversary hearing and procedure pursuant to "the

governor's publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining whether a person under a sentence of death is insane," Goode v. Wainwright, 448 So.2d 999, 1001 (Fla. 1984), and knowing the Governor never considered the report of Dr. Harold Kaufman, who found Petitioner insane, the courts nevertheless held there was no denial of due process.

The sole authority for those decisions was this Court's decision in Solesbee v. Balkcom, supra. Yet Solesbee is inapposite for four reasons. First, the facts presented here - a per se rule against advocacy on behalf of a condemned person in the determination of his sanity in the face of direct evidence of such insanity - were not present in Solesbee. "Whether this Governor declined to hear any statements on petitioner's be-

half, this record does not show." 339 U.S. at 13. Moreover, in Solesbee, this Court, with no record of any exclusion of evidence on behalf of Solesbee, assumed that governor would accept and consider all direct evidence proffered on behalf of the condemned. Thus, this Court stated it "would suppose that most if not all governors, like most if not all judges, would welcome any information which might be suggested in cases when human lives depend upon their decision." 339 U.S. at 13. In contrast, in this case Dr. Kaufman's report was not welcomed; it was not even considered.

Second, this Court in Solesbee relied heavily on a belief in the similarity between executive clemency or pardon on the one hand, and stay of execution by reason of insanity on the other. 339 U.S. at 11-12. Under Florida law, and the law of several other

states, there is no similarity. Unlike pardons or similar acts of clemency, which rest in the "sole, unrestricted, unlimited discretion" of the Governor[2/], Florida law flatly prohibits the Governor from executing an insane person. There is no discretion. Once insanity is determined, execution must be stayed. The relevant statute, Section 922.07(3) of the Florida Statutes, uses mandatory language: a condemned prisoner lacking capacity "shall" be committed to a mental institution until his capacity is restored. Similarly, under the common law of Florida, "one [could not] be . . . executed while insane." Perkins v. Mayo, 92 So.2d 641, 644 (Fla. 1957). See also Ex parte

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2/ Sullivan v. Askew, 348 So.2d 312 (Fla. 1977), cert. denied, 434 U.S. 878 (1977). See also, Fla. Stat. Ann. §940 (West 1983).

Chesser. 93 Fla. 291, 111 So. 720, 721 (Fla. 1927); Hysler v. State, 136 Fla. 563, 187 So. 261, 262 (1939).[3/]

The third reason why Solesbee does not apply is the law of procedural due process has changed radically since this Court's decision in Solesbee, completely eroding the principal legal foundation on which Solesbee was constructed. Solesbee was decided at a time when the procedural protections of the Due Process Clause were applicable only to "rights", not "privileges", which included the privilege not to be executed while insane. See, e.g. Ughbanks v. Armstrong, 208 U.S. 481 (1908); Escoe v. Zerbst, 295 U.S. 490 (1935). Since Solesbee was decided, this

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3/ Ironically, the Governor as a matter of practice always holds hearings on requests for clemency, while never holding them in determination for sanity.

Court has rejected any distinction conditioning the availability of procedural due process on whether a "right" or a "privilege" exists under state law. See Shapiro v. Thompson, 394 U.S. 618 (1969). Thus, persons who have "legitimate claims of entitlement" to benefits conferred under state law have been accorded procedural due process protections since Board of Regents v. Roth, 408 U.S. 564 (1972). Due process protections no longer depend upon a determination of whether a "right" or "privilege" is extended by the state, Goldberg v. Kelly, 397 U.S. 254, 262-263 (1970); Shapiro v. Thompson, supra. 394 U.S. at 627 n.6 (1969); and see Wolff v. McDonnell. 418 U.S. 539, 555-556 (1974); Goss v. Lopez. 419 U.S. 565, 573 (1975); Bell v. Burson, 402 U.S. 535, 539 (1971). The mere expectation of benefit is enough to vest due process protections; whether such benefit is

a "right" or a "privilege" is irrelevant. "[W]hether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

By virtue of the state-created right not to be executed while insane, see Perkins v. Mayo, supra, and Hysler v. State, supra, Florida has thus created an interest which warrants protection under the due process clause of the Fourteenth Amendment. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979); Board of Regents v. Roth, 408 U.S. 564 (1972).

Finally, subsequent decisions of this Court have undercut another legal premise upon which the Solesbee holding was built. Solesbee's refusal to extend due process

protection to a post conviction sanity determination was in part based on the then recent decision in Williams v. New York. 337 U.S. 241 (1949), which held that a sentencing judge could rely upon confidential information without violating procedural due process. The Court in Gardner v. Florida, 430 U.S. 349 (1977) overruled that portion of Williams and held Gardner was denied due process when his death sentence was imposed based upon information he had no opportunity to refute or explain. 430 U.S. at 357-358, 362.[4/] Of the two remaining cases relied

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4/ The Court in Gardner observed that the Williams opinion itself had "recognized that the passage of time justifies a re-examination of capital sentencing pr cedures." In 1949, when the Williams case was decided, no significant constitutional differences between the death penalty and lesser punishments for crime had been expressly recognized by this Court." Id. at 350. But subsequent to Williams, the Court "expressly recognized that death is a different kind of punishment

upon by this Court in Solesbee, in one, Phyle v. Duffy, 334 U.S. 431 (1948), the due process questions were not decided, and upon remand, Phyle received a hearing. In the other, Nobles v. Georgia, 168 U.S. 398 (1897), the "only question" was whether due process required a jury trial in a judicial proceeding.

II. Procedural due process requires certain minimal protections which were not provided here by the State of Florida and are not provided by most of the remaining states with capital punishment.

from any other which may be imposed in this country." Id. Gardner thus substantially undercut the reasoning of both Williams and Solesbee by stating that the constitutional developments in the area of capital punishment and due process require greater procedural protections for individuals convicted of capital crimes.

Recognizing that "due process is flexible and calls for such procedural protections as the particular situation demands," Morrissey v. Brewer, supra. 408 U.S. at 481, and see id. at 489, Amici submit that the following minimal due process safeguards are required to be afforded by the Governor of the State of Florida or anyone else in determining whether a condemned inmate is sane and can therefore be executed:

1. A right to effective assistance of counsel at all stages of the determination process;

2. A right of access to the experts' reports submitted to the Governor or such other person who is making the sanity determination prior to the determination being made, with a corresponding and timely right to comment on, challenge, or present rebuttal evidence to those reports, including the right to retain such other expert or experts as may be appropriate;

3. An evidentiary hearing before the Governor or other person making the determination, at which the inmate is given the opportunity, after adequate notice, to present evidence, cross-examine adverse witnesses, and obtain a decision with findings of fact that are adequate to provide the basis for meaningful judicial review; and

4. Judicial review.

Set forth below are the reasons for recognition of these protections as required by the Due Process Clause.

1. A right to effective assistance of counsel should be provided at all stages of the determination process.

Any procedural due process protection would be of little value if the condemned were not afforded the right to have counsel participate throughout. The "right to be heard would be, in many cases, of little

avail if it did not comprehend the right to be heard by counsel."[5] That is especially true for insane prisoners, who being too unfit to assist their attorneys,[6] cannot be expected to proceed without them. "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard."[7]

A related consideration is when such right to counsel begins. Eight states grant

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[5] Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 [1932]).

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[6] Seven states (Idaho, Louisiana, Missouri, Mississippi, Montana, Oklahoma, and Utah) include in their definition of unfitness for execution the prisoner's inability to assist counsel in his own defense.

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[7] Goldberg, supra, 397 U.S. at 268-69 (footnote omitted).

the prisoner, his counsel or next friend the right to initiate the proceedings.[8] A ninth, California, denies it,[9] but begins a sanity investigation automatically upon the scheduling of an execution.[10] Thus, almost three quarters of the 41 states with capital punishment do not even afford a condemned person the right to have his sanity determined, but instead put him at the mercy of the unfettered discretion of various state officials. Thus, for example, Arkansas provides that when the state penitentiary superintendent "is satisfied that there are rea-

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[8] See Appendix I, category 1.

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[9] Caritativo v. California, 357 U.S. 549 (1958).

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[10] Cal. Penal Code § 3700.5 (West 1982).

sonable grounds for believing" that a condemned prisoner is insane, the superintendent may transfer him to a state hospital.[11] In Florida, the Governor is required to initiate the process when he or she "is informed that a person under sentence of death may be insane." Section 922.07, Florida Statutes.

2. The prisoner should be provided access to the experts' reports submitted to the Governor or such other person who is making the sanity determination prior to the determination being made, with a corresponding right to comment on, challenge, or present rebuttal evidence to those reports, including the right to retain such other expert or experts as may be appropriate.

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[11] Ark. Stat. Ann. § 43-2622 (1977) (emphasis added).

Once the question of insanity has been raised,qualified mental examiners must be appointed to diagnose the prisoner's condition. "Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the, elusive and often deceptive symptoms of insanity'. . . ."[12/]

Once the issue of a prisoner's sanity has been raised, the appointment of mental examiners, or the prisoner's commitment to a mental health facility for observation is mandatory in 18 states,[13/] including Florida,

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12/ Ake v. Oklahoma, 470 U.S. _____, 105 S.Ct. 1087, 1095 (1985).

13/ California, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Maryland, Massachusetts, Missouri, Montana, Nebraska, Nevada, North Carolina, South Carolina, South

and discretionary in six states.[14] Examiners in the various states include state hospital officials,[15] and physicians who are not necessarily psychiatrists.[16] Thus, of the 36 states with statutes or case law on execution of the insane, 24 recognize the importance of mental examination or observation.[17]

Dakota, Utah, and Virginia.

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[14] Arkansas, Colorado, Connecticut, Georgia, Louisiana, and Rhode Island.

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[15] Kansas, Nebraska.

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[16] Nevada, South Dakota.

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[17] Twelve states (Alabama, Arizona, Mississippi, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, and Wyoming) do not provide for the appointment of qualified examiners. New York permits the governor to appoint "a commission of not more than three disinterested persons." N.Y. Correct. Law § 655 (McKinney 1984).

The mental examiners must report in writing. Knowing that their findings can be scrutinized by all parties, the public, and when applicable, the decision-maker and reviewer of the decision, encourages the examiners to report fairly and accurately.[18] Forcing the examiners to articulate their findings further encourages accuracy.[19] Of the 24 states that provide condemned prisoners with mental examinations or observation, 13, not including Florida, require the examiners to report in writing.[20]

18/ Wolff v. McDonnell, 418 U.S. 539, 565 (1974).

19/ Cf. Goldberg, 397 U.S. at 271 ("the decision maker should state the reasons for his determination and indicate the evidence he relied on, . . . though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law").

In Florida, while on the one hand the Governor is required to appoint experts and have reports prepared as part of his "publicly announced policy of excluding all advocacy on the part of the condemned from the process of determining [sanity or insanity]," Goode v. Wainwright, 448 So.2d at 1001, the inmate's counsel is permitted to read and perceive all the errors in the reports, yet precluded from doing anything about them. Ironically, in clemency determinations in Florida, where the inmate has no right to clemency, in contrast to the right of the insane not to be executed, it is just the opposite, and the inmate has a right to an adversarial hearing.

Finally, the condemned prisoner alleging

20/ See Appendix I, category 5.

insanity must have his own mental examiner appointed if he requests.[21]

"[W]ithout the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, . . . the inaccurate resolution of sanity issues is extremely high."[22]

Five states already recognize the importance of a mental examiner appointed for or retained by the prisoner during pre-execution proceedings.[23] If the prisoner is indigent and so requests, Illinois permits but does require the sentencing court to appoint a

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[21] Cf. Ake v. Oklahoma, 470 U.S., 105 S. Ct. 1087 (1985).

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[22] Id. at 1096.

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[23] See Appendix I, category 4.

qualified expert chosen by the prisoner, to be reimbursed by the county.[24] In Idaho[25] and Montana,[26] the court may direct that a psychiatrist retained by the prisoner participate in the mental examination. In Utah, an alienist who has knowledge of the prisoner's mental condition may be subpoenaed to testify at the hearing.[27] And in Louisiana, "[T]he court order for a mental examination shall not deprive the defendant . . . of the right to an independent mental examination by

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[24] Ill. Ann. Stat. ch. 38 ¶ 104-13(e) (Smith-Hurd 1982).

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[25] Idaho Code § 318-211(1) (1979).

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[26] Mont. Code Ann. § 46-4-202 (1983).

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[27] Utah Code Ann. § 77-15-5(5).

a physician of his choice. . . ."[28]

3. An evidentiary hearing should be held, at which the prisoner is given the opportunity, after adequate notice, to present evidence, cross-examine adverse witnesses, and obtain a decision with findings of fact that are adequate to provide the basis for meaningful judicial review.

An adversarial evidentiary hearing,[29] with participation by both the state and the prisoner[30] through his counsel, must be held

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[28] La. Code Crim. Proc. Ann. art. 646 (West 1981).

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[29] Cf. Greene v. McElroy, 360 U.S. 474, 497 (1959) ("The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination. . . has found increasing strength in lengthened experience.") (quoting 5 Wigmore on Evidence [3d ed. 1940] § 1367).

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[30] The prisoner himself should also be guaranteed the right to be present at the

to determine the prisoner's sanity. Of the 36 states with applicable statutes or case law, 11 provide such adversarial hearings.[31/]

hearing, a right secured by three states. See Appendix I, category 7. (Twelve states at least guarantee the prisoner's counsel that right. See Appendix I, category 8.)

A major purpose of the historic prohibition on executing the insane is "peradventure, says the humanity of English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution." 4 W. Blackstone, Commentaries on the Laws of England 24-25 (1768). See Solesbee v. Balkcom, 339 U.S. 9, 17-19 (Frankfurter, J., dissenting) (citing Blackstone; 1 Hale, The History of Pleas of the Crown 34-35 [1736]; and Remarks on the Tryal of Charles Bateman by Sir John Hawles, Solicitor-General in the reign of King William III, 3 State-Tryals 651, 652-53 (1719]).

Seven states (Idaho, Louisiana, Missouri, Mississippi, Montana, Oklahoma, and Utah) include in their definition of unfitness for execution the prisoner's inability to assist counsel in his own defense. According to the same reasoning that the prisoner's sanity is a prerequisite to an effective defense, the prisoner's presence at the hearing is a prerequisite in effectively establishing his insanity.

The prisoner must be guaranteed the right to present evidence[32] and cross-examine adverse witnesses.[33] These components of a hearing are considered fundamental under procedural due process.[34]

31/ See Appendix I, category 6.

32/ Morrissey v. Brewer, 408 U.S. 471, 489 (1972). See also Goldberg, 397 U.S. at 267. ("The fundamental requisite of due process of law is the opportunity to be heard") (quoting Grannis v. Ordean. 234 U.S. 385, 394 [1914]).

33/ Morrissey, 408 U.S. at 489 (1972); see also Goldberg. 397 U.S. at 268-69 ("In almost every setting were important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").

34/ See e.g., Morgan v. United States, 304 U.S. 1, 18 (1938); Greene v. McElroy, 360 U.S. 474, 497 (1959).

Twelve states allow condemned prisoners to present witnesses or evidence during sanity hearings or examinations.[35] Louisiana,[36] and apparently Ohio[37] and Wyoming[38] permit prisoner to compel attendance of witnesses. In three other states, the prisoner may summon the examining pychia-

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35/ See Appendix I, category 6C.

36/ La. Code Crim. Proc. Ann. art. 644 (1981).

37/ Ohio Rev. Code Ann. § 2949.29 (Page 1982) ("Witnesses may be produced and examined. . . .") See In re Keaton, 19 Ohio App. 2d 254, 250 N.E. 2d 901, 903 (1969) vac'd and rem'd, 408 U.S. 936 (1972) (court allowed prisoner's counsel to present evidence).

38/ Wyo. Stat. § 7-13-902 ("Witnesses may be produced and examined. . . ."). Note similarity to Ohio's statute.

trists.[39] In a fourth state, the prisoner may also subpoena an alienist who has knowledge of his mental condition.[40]

Eight states provide for some form of cross-examination by the prisoner or his counsel.[41] Five of those states limit cross-examination to mental examiners.[42]

The procedure to determine if the prisoner has recovered his sanity must also have as many safeguards as the original determination of insanity. Fourteen states guarantee as many procedural protections

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39/ See Appendix I, category 6B.

40/ Utah Code Ann. § 77-15-5(5) (1982).

41/ See Appendix I, category 6D.

42/ Id.

during subsequent determinations of sanity as during the original one, nine do not, and 13 are unclear.[43]

4. Judicial review.

The prisoner's sanity must ultimately be determined judicially by a court or jury.

Some states allow final determinations by the mental examiners or governor. Sanity is determined by mental examiners in ten states, and by the governor in three states.[44] In Massachusetts, it is unclear whether the governor and the executive council, two examining psychiatrists, or all of them determine sanity.[45] In the remaining

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[43] See Appendix I, category 11.

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[44] See Appendix I, category 9.

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[45] Mass. Ann. Laws ch. 279, § 62 (Michie/

states, the determination is made by a court or jury.

Because the right to an impartial decision-maker is required by due process,"[46] governors should be prohibited from making final determinations of sanity.[47]

Law Coop. 1984 Supp.)

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[46] Arnett v. Kennedy, 416 U.S. 134, 197 (1974) (White, J., concurring in part and dissenting in part). See Goldberg, 397 U.S. at 271 ("of course, an impartial decision maker is essential").

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[47] Although their input is vital, mental examiners should also not be making the final determination of sanity. "Psychiatry is not . . . an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, [and] on the appropriate dignosis to be attached to given behavior and symptoms. . . . Perhaps because there is often no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party." Ake, 470 U.S. at _____.

Of the 36 states with applicable statutes or case law on execution of the insane, 22 determine sanity judicially.[48]

The determination of insanity must be judicially appealable. One state allows determinations of sanity to be appealed,[49] ten preclude it, and the rest are unclear.[50]

105 S.Ct. at 1087.

48/ Ake. 470 U.S. at _____, 105 S.Ct. at 1096.

49/ Ill. Ann. Stat. Ch. 38 ¶104-16(e) (Smith-Hurd 1982). Mississippi permits the determination of recovery of sanity to be appealed. Miss. Code Ann. § 99-19-57 (1985 Supp.).

50/ See Appendix I, category 10.

CONCLUSION

Amici are not requesting this Court to impose a "code of procedure; that is the responsibility of each state."[51/] Amici do request, however, that this Court articulate "the minimum requirements of due process[52/] for prisoners who become insane while awaiting capital punishment.

51/ Morrisey, 408 U.S. at 488.

52/ Morrisey, 408 U.S. at 489.

For this and the foregoing reasons, amici respectfully request that Petitioner's petition for a writ of certiorari be granted.

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APPENDIX I

1. May the prisoner, counsel, or next friend initiate the process?

2. Must mental examiners be appointed to determine sanity?

3. May mental examiners be state employees?

4. May the prisoner have his own examiner participate?

5. Must mental examiners report in writing?

6. Is an adversarial hearing held?

6A. Is the proceeding (whether or not adversarial) administrative (A) or judicial (J)?

6B. Is the prisoner guaranteed the right to compel attendance of witnesses?

6C. Is the prisoner guaranteed the right to present witnesses or evidence?

6D. Is the prisoner guaranteed the right to cross-examine witnesses?

7. Is the prisoner guaranteed the right to be present?

8. Is the prisoner guaranteed the right to counsel at the proceeding?

9. Is sanity determined by court (C), jury (J), mental examiner(s) (E), or governor (G)?

10. Is the determination of sanity appealable?

11. Does the procedure to determine recovery of sanity have as many safeguards as the original determination of insanity?

Y = Yes
N = No
NA = Not Applicable
U = Unclear
* = State does not have death penalty.
- = State does not have applicable statute or case law.

Appendix I

	1	2	3	4	5	6	6A	6B	6C	6D	7	8	9	10	11
Alabama	N	N	NA	U	NA	N	J	N	N	N	N	N	C	N	N
Alaska	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Arizona	N	N	NA	U	NA	N	J	N	N	N	N	N	J	U	U
Arkansas	N	Y	Y	U	N	N	NA	NA	NA	NA	NA	NA	E	U	U
California	1	Y	Y	U	NA	N	J	N	N	N	N	N	J	N	N
Colorado	Y	N	Y	U	N	Y	J	U	Y	U	U	Y	C	N	Y
Connecticut	N	N	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	N
Delaware	N	Y	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	U
Florida	N	Y	Y	N	N	N	A	N	N	NA	2	Y	G	N	Y
Georgia	N	N	Y	N	Y	N	NA	NA	NA	NA	NA	NA	G	N	N
Hawaii	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Idaho	N	Y	Y	Y	Y	Y	J	3	Y	3	2	Y	C	U	Y
Illinois	Y	Y	Y	Y	Y	Y	J	U	Y	Y	Y	Y	C	Y	Y
Indiana	Y	Y	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	Y
Iowa	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Kansas	N	Y	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	Y
Kentucky	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Louisiana	Y	N	Y	Y	Y	Y	J	Y	Y	3	2	Y	C	U	Y
Maine	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Maryland	N	Y	Y	N	N	N	NA	NA	NA	NA	NA	NA	G	U	Y

Appendix I

	1	2	3	4	5	6	6A	6B	6C	6D	7	8	9	10	11
Massachusetts	N	Y	Y	N	N	N	A	N	N	N	N	N	4	U	Y
Michigan	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Minnesota	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Mississippi	Y	N	NA	U	NA	N	NA	N	N	N	N	N	C	U	Y
Missouri	N	Y	Y	N	N	N	J	N	N	N	N	N	C	U	N
Montana	Y	Y	Y	Y	Y	Y	J	3	Y	3	2	Y	C	U	Y
Nebraska	N	Y	Y	N	Y	N	NA	NA	NA	NA	NA	NA	E	U	Y
Nevada	N	Y	Y	U	Y	Y	J	U	Y	Y	Y	Y	C	U	N
New Hampshire	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
New Jersey	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
New Mexico	N	N	NA	U	NA	N	J	N	N	N	N	N	C	N	N
New York	N	N	N	N	N	Y	A	N	Y	U	2	Y	E	N	U
North Carolina	Y	Y	N	U	Y	Y	J	U	Y	3	Y	U	C	U	U
North Dakota	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Ohio	N	N	NA	N	NA	Y	J	Y	Y	Y	N	Y	C or J	U	U
Oklahoma	N	N	NA	U	NA	N	J	N	N	N	N	N	J	N	N
Oregon	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Pennsylvania	U	U	U	U	U	U	U	U	U	U	U	U	C	U	U
Rhode Island	N	N	Y	U	N	N	J	NA	NA	NA	NA	NA	C	U	Y
South Carolina	Y	Y	Y	N	N	N	NA	NA	NA	NA	NA	NA	E	U	U
South Dakota	N	Y	Y	N	N	Y	J	N	Y	U	2	Y	E	N	Y

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	1	2	3	4	5	6	6A	6B	6C	6D	7	8	9	10	11
Tennessee	U	U	U	U	U	U	J	U	U	U	U	U	C	U	U
Texas	N	U	U	U	U	U	J	U	U	U	U	U	C	N	U
Utah	N	Y	Y	Y	Y	Y	J	5	5	5	2	Y	C	U	U
Vermont	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Virginia	U	Y	U	U	U	N	J	NA	NA	NA	U	Y	E	U	U
Washington	N	N	U	U	U	U	J	N	N	N	N	N	C	U	U
West Virginia	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Wisconsin	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Wyoming	N	N	NA	U	NA	U	J	Y	Y	U	N	U	J	U	N

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1. Although condemned prisoner may not initiate the process, it begins automatically 20 days before a scheduled execution.

2. Prisoner's counsel may be present at the hearing. It is unclear whether prisoner may too.

3. Prisoner may compel attendance of examing psychiatrists, and cross-examine them.

4. It is unclear who determines sanity; the governor and the executive council, two examining psychiatrists, or all of them.

5. Alienists who examined prisoner or who otherwise have knowledge of his mental condition may be subpoenaed to testify.

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APPENDIX II

States with applicable statutes or case law on execution of the insane.

Alabama	Ala. Code § 15-16-23 (1982)
Arizona	Ariz. Rev. Stat. Ann. 13.4021 et seq. (1978)
Arkansas	Ark. Stat. Ann. § 43-2622 (1977)
California	Cal. Penal Code § 3700 et seq. (West 1982)
Colorado	Colo. Rev. Stat. § 16-8-110 et seq. (1978)
Connecticut	Conn. Gen. Stat. Ann. § 54-101. (West 1985 Supp.)
Delaware	Del. Code Ann. title 11, § 406 (1979)
Florida	Fla. Stat. Ann. § 922.07 (West 1983)
Georgia	Ga. Code Ann. 27-2601 et seq. (1983)
Idaho	Idaho Code § 18-210 et seq. (1979)
Illinois	Ill. Ann. Stat. ch. 38 ¶ 1005-2-3 (Smith-Hurd 1982)

Indiana	Ind. Code Ann. § 11-10-4-2 et seq. (Burns 1981)
Kansas	Kan. Stat. Ann. § 22-4006 (1981)
Louisiana	La. Code Crim. Proc. Ann. art. 641 et seq. (West 1981)
Maryland	Md. Ann. Code art. 27 § 75(c) (1985 Supp.)
Massachusetts	Mass. Ann. Laws ch. 279, § 62 (Michie/ Law Coop. 1984 Supp.)
Mississippi	Miss. Code Ann. § 99-19-57 (1985 Supp.)
Missouri	Mo. Ann. Stat. § 552.060 (Vernon 1984 Supp.)
Montana	Mont. Code Ann. § 46-14-103 et seq. (1983)
Nebraska	Neb. Rev. Stat. § 29-2537 et seq. (1979)
Nevada	Nev. Rev. Stat. § 176.425 et seq. (1983)
New Mexico	N.M. Stat. Ann. § 31-14-3 et seq. (1978)
New York	N.Y. Correct. Law § 654 et seq. (McKinney 1984)

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North Carolina	N.C. Gen. Stat. § 15-A-1001 et seq. (1983)
Ohio	Ohio Rev. Code Ann. 2949.28 et seq. (Page 1982)
Oklahoma	Okla. Stat. Title 22 § 1005 et seq. (West 1983)
Pennsylvania	Commonwealth v. Moon, 383 Pa. 18, 117 A.2d 96 (Penn. 1955)
Rhode Island	R.I. Gen. Laws § 40.1-5.3-6 (1984)
South Carolina	S.C. Code Ann. § 44-23-210 (Law. Co-op. 1985)
South Dakota	S.D. Codified Laws Ann. § 23A-27A-21 (1979)
Tennessee	Jordan v. State, 124 Tenn. 81, 135 S.W. 327 (Tenn. 1911)
Texas	Ex Parte Morris, 96 Tex. Crim. 256, 257 S.W. 894 (Tex. Crim. App. 1924)
Utah	Utah Code Ann. § 77-15-1 et seq. (1982)
Virginia	Va. Code § 19.2-177 (1983)

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Washington	State ex rel. Alfani v. Superior Court for Grays Harbor Countty 245 P. 929 (Wash. 1926); State v. Nordstrom, 7 Wash. 506, 35 P. 382 (Wash. 1893)
Wyoming	Wyo. Stat. § 7-13-901 et seq. (1977)

Appendix II

CERTIFICATE OF SERVICE

I, Sanford L. Bohrer, a member of the Bar of this Court, certify that three copies of the foregoing Motion for Leave to File and Brief of the Office of the Capital Collateral Representative and the Florida Mental Health Association as Amici Curie were served this thirty-first day of October, 1985, by mail, postage prepaid, upon the following counsel:

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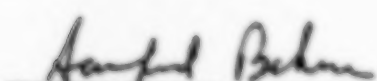

Sanford L. Bohrer